

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT

State/Territory: West Virginia

REQUIREMENTS FOR ADVANCE DIRECTIVES UNDER STATE PLANS
FOR MEDICAL ASSISTANCE

The following is a written description of the law of the State (whether statutory or as recognized by the courts of the State) concerning advance directives. If applicable States should include definitions of living will, durable power of attorney for health care, durable power of attorney, witness requirements, special State limitations on living will declarations, proxy designation, process information and State forms, and identify whether State law allows for a health care provider or agent of the provider to object to the implementation of advance directives on the basis of conscience.

State legislation was enacted March 9, 1990 which amended Chapter Sixteen, Article 30 of the Code of West Virginia, relating to the West Virginia Natural Death Act. These amendments established procedures for executing a living will. A copy of the law is submitted as Supplement 1 to ATTACHMENT 4.34-A.

State legislation was enacted March 1, 1990 which amended Chapter Sixteen by adding a new Article 30-A, Medical Power of Attorney. A copy of the law is submitted as Supplement 2 to ATTACHMENT 4.34-A.

TN No. 91-15
Supersedes Approval Date 1-15-92 Effective Date 12-1-91
TN No. NEW

HCFA ID: 7982E

ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 416

(BY SENATORS BURDETTE, MR. PRESIDENT, AND BOLEY,
BY REQUEST OF THE EXECUTIVE)

[Passed March 9, in effect ninety days from passage.]

AN ACT to amend and reenact sections two, three, four, five, six, seven, eight and nine, article thirty, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to further amend said article by adding thereto three new sections, designated sections eleven, twelve and thirteen, all relating to the West Virginia natural death act; amending definitions; providing for the definition of life-prolonging intervention; procedures for executing a living will; providing additional circumstances for witnessing a living will and deleting the requirement that the witnesses must attest to the declarant's competency; providing for advising persons of the existence and availability of living will and medical power of attorney forms and giving assistance in completing such forms; providing for implementation of a living will when person is in a persistent vegetative state; revocation; physician's duty to communicate and document terminal condition or persistent vegetative state; capacity and intent of declarant; liability and inability of physician to comply with the living will; deleting

91-15

1-15-92

12-1-91

penalties for willful fraud in preparation, execution or concealment of a living will; insurance; preservation of existing rights; continuation of an existing living will; reciprocity; relation to existing law; and severability.

Be it enacted by the Legislature of West Virginia:

That sections two, three, four, five, six, seven, eight and nine, article thirty, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; and that said article be further amended by adding thereto three new sections, designated sections eleven, twelve and thirteen, all to read as follows:

ARTICLE 30. WEST VIRGINIA NATURAL DEATH ACT.

§16-30-2. Definitions.

1 For the purposes of this article, the terms:

2 (1) "Attending physician" means the physician
3 selected by, or assigned to, a person and who has
4 primary responsibility for the treatment and care of
5 the person;

6 (2) "Declarant" means a person who has executed a
7 living will;

8 (3) "Health care provider" means a person, partner-
9 ship, corporation, facility or institution licensed,
10 certified or authorized by law to provide professional
11 health care services in this state;

12 (4) "Health care representative" means a person
13 eighteen years of age or older appointed by another
14 person to make health care decisions pursuant to the
15 provisions of article thirty-a of this chapter or similar
16 act of another state and recognized as valid under the
17 laws of this state;

18 (5) "Incapacity", or words of like import, means the
19 inability because of physical or mental impairment, to
20 appreciate the nature and implications of a health care
21 decision, to make an informed choice regarding the
22 alternatives presented and to communicate that choice
23 in an unambiguous manner as determined by two

24 physicians or by one physician and one licensed
25 psychologist, both of whom are licensed to practice in
26 this state, and additionally, have examined the declar-
27 ant. The declarant's attending physician shall be one
28 of those who makes the determination required
29 herein;

30 (6) "Life-prolonging intervention" means any medi-
31 cal procedure or intervention which, when applied to
32 a person would serve solely to artificially prolong the
33 dying process or to maintain the person in a persistent
34 vegetative state. The term "life-prolonging interven-
35 tion" does not include the administration of medica-
36 tion or the performance of any other medical proce-
37 dure deemed necessary to provide comfort or to
38 alleviate pain;

39 (7) "Living will" means a written, witnessed
40 advance directive governing the withholding or with-
41 drawing of life-prolonging intervention, voluntarily
42 executed by a person in accordance with the require-
43 ments of section three of this article;

44 (8) "Persistent vegetative state" means a permanent
45 and irreversible state as diagnosed by the attending
46 physician and a second physician in which the person
47 has intact brain stem function but no higher cortical
48 function and has neither self-awareness or awareness
49 of the surroundings in a learned manner;

50 (9) "Physician" means a person licensed and autho-
51 rized to practice medicine; and

52 (10) "Terminal condition" means an incurable
53 condition caused by injury, disease or illness, which in
54 the judgment of the attending physician and a second
55 physician would result in death within a relatively
56 short time.

§16-30-3. Executing a living will.

1 (a) Any mentally competent person eighteen years
2 of age or older may execute at any time a living will
3 governing the withholding or withdrawal of life-
4 prolonging intervention from himself or herself. A
5 living will made pursuant to this article shall be: (1) In

6 writing; (2) executed by the declarant or by another
7 person in the declarant's presence at the declarant's
8 express direction if the declarant is physically unable
9 to do so; (3) dated; (4) signed in the presence of two or
10 more witnesses at least eighteen years of age; and (5)
11 signed and attested by such witnesses whose signa-
12 tures and attestations shall be acknowledged before a
13 notary public as provided in subsection (d) of this
14 section.

15 (b) In addition, a witness may not be:

16 (1) The person who signed the living will on behalf
17 of and at the direction of the declarant;

18 (2) Related to the declarant by blood or marriage;

19 (3) Entitled to any portion of the estate of the
20 declarant according to the laws of intestate succession
21 of the state of the declarant's domicile or under any
22 will of the declarant or codicil thereto: *Provided*, That
23 the validity of the living will shall not be affected
24 when a witness at the time of witnessing such living
25 will was unaware of being a named beneficiary of the
26 declarant's will;

27 (4) Directly financially responsible for declarant's
28 medical care;

29 (5) The attending physician; or

30 (6) The declarant's health care representative, proxy
31 or successor health care representative.

32 (c) It shall be the responsibility of the declarant to
33 provide for notification to his or her attending physi-
34 cian and other health care providers of the existence
35 of the living will. An attending physician, when
36 presented with the living will, shall make the living
37 will or a copy of the living will a part of the declar-
38 ant's medical records.

39 (d) At the time of admission to any hospital or
40 extended care facility, each person shall be advised of
41 the existence and availability of living will and
42 medical power of attorney forms and shall be given
43 assistance in completing such forms if the person

44 desires: *Provided*, That under no circumstances may
45 admission to a hospital or extended care facility be
46 predicated upon a person having completed either a
47 medical power of attorney or living will.

48 (e) The living will may, but need not, be in the
49 following form, and may include other specific direc-
50 tions not inconsistent with other provisions of this
51 article. Should any of the other specific directions be
52 held to be invalid, such invalidity shall not affect other
53 directions of the living will which can be given effect
54 without the invalid direction and to this end the
55 directions in the living will are severable.

56 "LIVING WILL

57 "Living will made this _____ day
58 of _____ (month, year).
59 I, _____, being of sound mind,
60 willfully and voluntarily declare that in the absence of
61 my ability to give directions regarding the use of life-
62 prolonging intervention, it is my desire that my dying
63 shall not be artificially prolonged under the following
64 circumstances:

65 "If at any time I should be certified by two physi-
66 cians who have personally examined me, one of whom
67 is my attending physician, to have a terminal condi-
68 tion or to be in a persistent vegetative state, I direct
69 that life-prolonging intervention that would serve
70 solely to artificially prolong the dying process or
71 maintain me in a persistent vegetative state be with-
72 held or withdrawn, and that I be permitted to die
73 naturally with only the administration of medication
74 or the performance of any other medical procedure
75 deemed necessary to keep me comfortable and allevi-
76 ate pain.

77 "SPECIAL DIRECTIVES OR LIMITATIONS ON
78 THIS DECLARATION: (If none, write "none".)

79 "It is my intention that this living will be honored
80 as the final expression of my legal right to refuse
81 medical or surgical treatment and accept the conse-
82 quences resulting from such refusal.

83 "I understand the full import of this living will.

84 "Signed _____

85 "Address _____

86 _____

87 "I did not sign the declarant's signature above for or
88 at the direction of the declarant. I am at least eighteen
89 years of age and am not related to the declarant by
90 blood or marriage, entitled to any portion of the estate
91 of the declarant according to the laws of intestate
92 succession of the state of the declarant's domicile or to
93 the best of my knowledge under any will of declarant
94 or codicil thereto, or directly financially responsible
95 for declarant's medical care. I am not the declarant's
96 attending physician or the declarant's health care
97 representative, proxy or successor health care repre-
98 sentative under a medical power of attorney.

99 "Witness _____

100 "Address _____

101 _____

102 "Witness _____

103 "Address _____

104 _____

105 "STATE OF _____

106 "COUNTY OF _____

107 "The foregoing instrument was acknowledged before
108 me this _____(date) by the declarant
109 and by the two witnesses whose signatures appear
110 above.

111 "My commission expires: _____

112 " _____

113 Signature of Notary Public."

§16-30-4. Revocation.

1 (a) A living will may be revoked at any time only by

2 the declarant or at the express direction of the
3 declarant, without regard to the declarant's mental
4 state by any of the following methods:

5 (1) By being destroyed by the declarant or by some
6 person in the declarant's presence and at his direction;

7 (2) By a written revocation of the living will signed
8 and dated by the declarant or person acting at the
9 direction of the declarant. Such revocation shall
10 become effective only upon delivery of the written
11 revocation to the attending physician by the declarant
12 or by a person acting on behalf of the declarant. The
13 attending physician shall record in the declarant's
14 medical record the time and date when he or she
15 receives notification of the written revocation; or

16 (3) By a verbal expression of the intent to revoke the
17 living will in the presence of a witness eighteen years
18 of age or older who signs and dates a writing confirm-
19 ing that such expression of intent was made. Any
20 verbal revocation shall become effective only upon
21 communication of the revocation to the attending
22 physician by the declarant or by a person acting on
23 behalf of the declarant. The attending physician shall
24 record, in the declarant's medical record, the time,
25 date and place of when he or she receives notification
26 of the revocation.

27 (b) There is no criminal or civil liability on the part
28 of any person for failure to act upon a revocation
29 made pursuant to this section unless that person has
30 actual knowledge of the revocation.

**§16-30-5. Physician's duty to confirm, communicate and
document terminal condition or persistent
vegetative state; medical record
identification.**

1 (a) An attending physician who has been notified of
2 the existence of a living will executed under this
3 article, without delay after the diagnosis of a terminal
4 condition or persistent vegetative state of the declar-
5 ant, shall take the necessary steps to provide for
6 confirmation, written certification and documentation

7 of the declarant's terminal condition or persistent
8 vegetative state in the declarant's medical record.

9 (b) Once confirmation, written certification and
10 documentation of the declarant's terminal condition is
11 made, the attending physician shall verbally or in
12 writing inform the declarant of his or her terminal
13 condition or the declarant's health care representative,
14 next of kin or other responsible person, if the declar-
15 ant lacks capacity to comprehend such information
16 and shall document such communication in the declar-
17 ant's medical record.

18 (c) All inpatient health care facilities shall develop a
19 system to visibly identify a person's chart which
20 contains a living will as set forth in this article.

§16-30-6. Competency and intent of declarant.

1 (a) The desires of a capable declarant at all times
2 supersede the effect of the living will.

3 (b) If a person is incapacitated at the time of the
4 decision to withhold or withdraw life-prolonging
5 intervention, the person's living will executed in
6 accordance with section three of this article is pre-
7 sumed to be valid. For the purposes of this article, a
8 physician or health facility may presume in the
9 absence of actual notice to the contrary that a person
10 who executed a living will was of sound mind when it
11 was executed. The fact that a person executed a living
12 will is not an indication of the person's mental
13 incapacity.

§16-30-7. Liability and protection of living will; transfer.

1 (a) No health care provider or employee thereof who
2 in good faith and pursuant to reasonable medical
3 standards causes or participates in the withholding or
4 withdrawing of life-prolonging intervention from a
5 person pursuant to a living will made in accordance
6 with this article shall, as a result thereof, be subject to
7 criminal or civil liability.

8 (b) An attending physician who cannot comply with
9 the living will of a declarant pursuant to this article

10 shall, in conjunction with the health care representa-
11 tive, next of kin of the declarant or other responsible
12 person, effect the transfer of the declarant to another
13 physician who will honor the living will of the declar-
14 ant. Transfer under these circumstances does not
15 constitute abandonment.

§16-30-8. Insurance.

1 (a) The withholding or withdrawal of life-prolonging
2 intervention from a declarant in accordance with the
3 provisions of this article does not, for any purpose,
4 constitute a suicide and does not constitute the crime
5 of assisting suicide.

6 (b) The making of a living will pursuant to section
7 three of this article does not affect in any manner the
8 sale, procurement or issuance of any insurance policy
9 nor does it modify the terms of an existing policy. No
10 insurance policy may be legally impaired or invali-
11 dated in any manner by the withholding or with-
12 drawal of life-prolonging intervention from an insured
13 person, notwithstanding any term of the policy to the
14 contrary.

15 (c) No health care provider or health care service
16 plan, health maintenance organization, insurer issuing
17 disability insurance, self-insured employee welfare
18 benefit plan, nonprofit medical service corporation or
19 mutual nonprofit hospital service corporation shall
20 require any person to execute a living will as a
21 condition for being insured for or receiving health
22 care services.

**§16-30-9. Preservation of existing rights; no presumption;
living wills previously executed.**

1 (a) Nothing in this article impairs or supersedes any
2 legal right or legal responsibility which any person
3 may have to effect the withholding or withdrawal of
4 life-prolonging intervention in any lawful manner. In
5 such respect the provisions of this article are
6 cumulative.

7 (b) This article creates no presumption concerning
8 the intention of a person who has not executed a living

9 will to consent to the use or withholding of life-
10 prolonging intervention in the event of a terminal
11 condition or persistent vegetative state.

12 (c) A living will executed prior to the effective date
13 of this article and which expressly provides for the
14 withholding or withdrawal of life-prolonging interven-
15 tion or for the termination of life-sustaining proce-
16 dures in substantial compliance with the provisions of
17 section three of this article is hereby recognized as a
18 valid living will, as though it were executed in
19 compliance with the provisions of this article.

§16-30-11. Reciprocity.

1 A living will executed in another state is validly
2 executed for the purposes of this article if it is
3 executed in compliance with the laws of this state or
4 with the laws of the state where executed and
5 expressly provides for the withholding or withdrawal
6 of life-prolonging intervention or for the termination
7 of life-sustaining procedure.

§16-30-12. Relation to existing law.

1 Nothing in this article shall be construed to abrogate
2 the common law doctrine of medical necessity.

§16-30-13. Severability.

1 The provisions of this article are severable and if
2 any provision, section or part thereof shall be invalid,
3 unconstitutional or inapplicable to any person or
4 circumstance, such invalidity, unconstitutionality or
5 inapplicability shall not affect or impair any other
6 remaining provisions contained herein.